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No. 92-1432

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

—v.—

OPAL JOHNSON, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF WILLIAM JOHNSON, DECEASED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

PETITIONER'S REPLY BRIEF

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April 30, 1993

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PETITIONER'S REPLY BRIEF

Respondent's ("plaintiff's") opposition to petitioner Owens-Corning Fiberglas Corporation's ("OCF's") petition studiously ignores this Court's state-action jurisprudence and instead hides behind erroneous waiver arguments and other smokescreens. Plaintiff has grossly misrepresented the record—and has not even attempted to rebut OCF's state-action argument.

I.

OCF Preserved Its Federal Constitutional Arguments.

Plaintiff's assertion that OCF failed to preserve its Fourteenth Amendment due-process arguments in the state appellate courts is simply wrong.[1]

First, OCF's opening brief in the Illinois Appellate Court contained express references to "federal due process" [1a, 2a] and discussed the requirements of federal due process separately from those of Illinois due process [2a & n.5]. The brief also cited several of this Court's Fourteenth Amendment due-process decisions. [*Id.*]

Second, OCF's reply brief in the Appellate Court again relied on federal due-process principles. [5a, 6a, 7a; Resp. Br. 10a.]

Third, contrary to plaintiff's representation [Resp. Br. 8], OCF's petition for leave to appeal to the Illinois Supreme Court expressly asserted "the due process guarantee of the fourteenth amendment to the United States Constitution" [9a], which it also referred to as "federal due process" [8a, 12a, 13a] and "Due Process Requirements of the . . . United States Constitution" [12a; Resp. Br. 16a].

These discussions of "federal due process" and citations to this Court's Fourteenth Amendment decisions therefore raised the federal due-process question in the state courts—even though the Fourteenth Amendment and its state-law counterpart were not specifically listed in OCF's state-court tables of points and authorities and the Fourteenth Amendment's text was not quoted in the "Statutes Involved" section of OCF's opening brief to the

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[1] Plaintiff does not dispute OCF's statement [Cert. Pet. 4-6] that OCF initially raised the federal question in the trial court. [*See* Resp. Br. 7-9.]

Illinois Appellate Court. This Court's "jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 114 n.9 (1982); *see Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978) (reference in trial court to "fundamental principle[s] of judicial fair play" suffices to preserve federal due-process claim); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67-69 (1928) (general references to unconstitutionality suffice to preserve federal equal-protection claim in view of other indications that claim rests on Fourteenth Amendment's Equal Protection Clause).

Moreover, the Illinois Appellate Court cannot be said to have disposed of OCF's appeal on an adequate and independent state due-process ground. Illinois may offer greater protection of individual rights than the federal Constitution requires, but it cannot offer less. When the Illinois Appellate Court rejected OCF's due-process claims without distinguishing between federal and state grounds [Cert. Pet. 11a], it therefore necessarily decided both the federal-law and the state-law questions presented in OCF's briefs.[2]

Plaintiff's representations that "OCF . . . failed to ever assert to the Illinois Appellate Court the issue of state action" [Resp. Br. 8] and that the Appellate Court never decided the issue [*id.* at 9] are also incorrect. OCF's appellate briefs cited this Court's state-action ruling in *Truax v. Raich*, 239 U.S. 33, 38-39 (1915), and specifically argued that the State could not use a private corpo-

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[2] In any event, the presumption of adequate and independent state grounds in *Durley v. Mayo*, 351 U.S. 277, 285 (1956), on which plaintiff relies [Resp. Br. 9], cannot survive *Michigan v. Long*, 463 U.S. 1032 (1983), where this Court held that a state court will be presumed to have based its decision on a federal question interwoven with the issues of the case unless the face of the opinion makes clear that the state court rested its decision on an adequate and independent state ground.

ration to accomplish indirectly what it could not constitutionally do directly. [3a-4a, 5a-6a.] The Appellate Court expressly (and erroneously) addressed the state-action question when it held that,

> [a]s long as the order is directed at the corporate defendant rather than the individual employees and directors, principles of due process are not violated, and a court may sanction a corporate defendant for its failure to produce its employees. Ultimately, it is the corporate defendant which forces its employees to submit to the jurisdiction of Illinois, not the court.

[Cert. Pet. 11a.]

This Court may decide any federal question either passed on or properly raised below. *See Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Taylor v. Kentucky*, 436 U.S. at 482 n.10. Because the federal constitutional issue was both raised by OCF and decided by the Illinois courts at all stages of the proceeding, plaintiff's claim that OCF did not preserve it is simply disingenuous.

II.

Plaintiff Cannot Question the Witnesses' Lack of Sufficient Minimum Contacts with Illinois to Satisfy the Fourteenth Amendment's Due-Process Requirements for Personal Jurisdiction.

Any question about the individual witnesses' lack of sufficient minimum contacts with Illinois to support state-court exercise of personal jurisdiction under the Fourteenth Amendment is foreclosed at this point. Plaintiff never claimed below that personal jurisdiction existed, and both the trial court and the Appellate Court expressly agreed with OCF that it did not. [*See, e.g.*, Cert. Pet. 11a ("The trial court recognized it did not have personal jurisdiction over [the witnesses]."); *accord id.* at 27a-28a.]

In its briefs to the Illinois courts, OCF argued that Dr. Konzen and Mr. Boeschenstein lacked sufficient "minimum contacts" with Illinois to satisfy federal due-process requirements [2a n.5] and that "[i]t is undisputed that under the . . . due process guarantee of the fourteenth amendment to the United States Constitution, the Illinois courts cannot constitutionally exercise personal jurisdiction over Mr. Boeschenstein and Dr. Konzen" [9a]. Plaintiff never contradicted OCF's assertions in her brief in the Appellate Court or in her opposition to OCF's petition for leave to appeal to the Illinois Supreme Court.

Nor had plaintiff argued or presented evidence in the trial court concerning the alleged sufficiency of Dr. Konzen's and Mr. Boeschenstein's minimum contacts with Illinois, even though OCF had raised its Fourteenth Amendment arguments in that court [Cert. Pet. 4]. Rather, plaintiff claimed that the jurisdictional issue was immaterial because she was not "trying to get jurisdiction over these individuals" [8 R. 4]. She argued that OCF—not the court—would be coercing the individuals to appear if OCF complied with the court's order and that minimum-contacts and state-action issues therefore did not arise.

Plaintiff was fully aware of OCF's federal constitutional arguments, but she made no attempt to meet her trial-court burden of proving that the witnesses had sufficient contacts with Illinois to satisfy federal due process. The Illinois courts concluded that personal jurisdiction did not exist [Cert. Pet. 11a, 27a-28a], and plaintiff may not now try to raise a *factual* question that she waived at trial, thereby precluding OCF and the witnesses from presenting evidence on the issue. *Cf. Steagald v. United States*, 451 U.S. 204, 209-11 (1981) (failure of government to raise factual issue below precluded it from raising issue in this Court).[3]

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[3] Even if plaintiff had not waived her chance to establish personal jurisdiction over the witnesses, and even if the trial court and

III.

Requiring the Individuals to Travel to Another State to Testify Would Have Involved a Deprivation of Their Liberty.

The State of Illinois sought to compel Dr. Konzen and Mr. Boeschenstein to leave their State of residence, travel to Illinois, appear at a specific place and time, give testimony, and remain there until they had finished testifying. While in Illinois, they could have been subject to penalties for contempt of court had they refused to respond to questions put to them—or had they chosen to leave the courtroom during their testimony. They also might have subjected themselves to the argument that they could be served with Illinois process while present in the State.

Courts therefore have long recognized that compelling a witness to testify involves an exercise of personal jurisdiction that is subject to well-established federal due-process limitations. [Cert. Pet. 7 n.4 and cases cited therein.] Moreover, plaintiff's claim that no deprivation of liberty is involved in requiring a person to travel to another State to testify ignores that freedom of movement is one of the liberties protected by the Due Process Clause, *see Kent v. Dulles*, 357 U.S. 116, 125-27 (1958).

For the reasons stated in OCF's certiorari petition, the Appellate Court erred in holding that Illinois courts may avoid those constitutional limitations by using private

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the Appellate Court had not decided the jurisdictional question, OCF still would be entitled to present evidence and be heard on this factual question on remand. Moreover, the trial court denied Dr. Konzen and Mr. Boeschenstein their own right to present evidence and be heard on this issue when it struck their special and limited appearances on the erroneous ground that it was not seeking to exercise jurisdiction over them. [Cert. Pet. 27a-29a.]

employers to coerce the attendance of witnesses beyond the courts' own reach. Where state action is present, any deprivation of an individual's right to stay or to go where he or she chooses must comport with due-process requirements. *See In re Sealed Case*, 832 F.2d 1268, 1272-74 (D.C. Cir. 1987) (subjecting witness subpoena to due-process scrutiny); *In re Marc Rich & Co.*, 707 F.2d 663, 667, 670 (2d Cir.) (same), *cert. denied*, 463 U.S. 1215 (1983).[4]

The cases on which plaintiff relies [Resp. Br. 11] hold only that the Constitution does not require the Government to pay compensation to a witness, *Hurtado v. United States*, 410 U.S. 578, 588-89 (1973) (incarceration of material witnesses before criminal trial was not taking of property requiring just compensation under Fifth Amendment); *In re Grand Jury No. 76-3*, 555 F.2d 1306, 1308-09 (5th Cir. 1977) (takings clause and Due Process Clause of Fifth Amendment did not require Government to compensate bank for cost of complying with subpoena for documents); *United States v. Friedman*, 532 F.2d 928, 935 (3d Cir. 1976) (same), and that subpoenas for bank records, for handwriting and voice exemplars, or for appearance before a grand jury do not fall within the Fourth Amendment's prohibition of unreasonable searches and seizures, *id.* at 934-35 (bank records); *United States v. Doe*, 457 F.2d 895, 897-98 (2d Cir. 1972) (handwriting and voice exemplars and appearance before grand jury), *cert. denied*, 410 U.S. 941 (1973). None of those cases addressed the courts' personal jurisdiction to compel witnesses to appear or give evidence.

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[4] This discussion—like OCF's petition itself—should answer plaintiff's purported question about "whose Fourteenth Amendment rights [OCF] claims have been violated" [Resp. Br. 9]. Dr. Konzen's and Mr. Boeschenstein's rights are at issue. As OCF demonstrated in its petition [at 13 n.6], OCF has standing to raise those individuals' rights in defending itself against the State's action.

IV.

Plaintiff's Contention That Dr. Konzen and Mr. Boeschenstein Would Have Appeared If OCF Had Instructed Them to Do So Is Irrelevant.

Plaintiff's final argument is that OCF purportedly could have directed Dr. Konzen and Mr. Boeschenstein to appear had it wished to do so—and that those individuals would have complied with OCF's direction. This argument misses the constitutional point.

The only relevant question here is whether state action exists when a state court tries to force an employer to do something that the court cannot constitutionally do on its own. If so, then OCF was entitled to decide—free from state-court coercion—how best to use the services of its own employees and directors, and those individuals were entitled to have OCF exercise its judgment and discretion unconstrained by unconstitutional state-court compulsion.

Plaintiff's argument is no different from the one that this Court rejected in *Truax v. Raich*, 239 U.S. 33 (1915), where a non-citizen employee sued to enjoin enforcement of a state law limiting the number of aliens any employer could employ. The State argued that, because the employer could discharge any of his employees at will, the State would not be responsible for the plaintiff employee's termination even if the employer's sole motivation were to comply with the challenged state law. This Court ruled that the state statute impermissibly would have affected the employer's employment decisions and that the non-citizen employee had a "manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion." *Id.* at 38.

The Court again rejected a similar argument in *Peterson v. City of Greenville*, 373 U.S. 244 (1963), which involved blacks who had been denied service and arrested in a pri-

vate restaurant because of a local ordinance requiring racial separation. The fact that "the manager would have acted as he did independently of the existence of the ordinance" and might in fact have been happy not to serve the would-be black patrons was constitutionally irrelevant, *id.* at 248; the prospective patrons had the right to be free of unconstitutional state-sponsored conduct even if the restaurant manager privately would have made the same decision on his own. *Accord Barrows v. Jackson*, 346 U.S. 249, 253-54 (1953) (property owner may choose to honor racially restrictive covenant and not sell property to blacks, but state cannot encourage her to do so or sanction her for breaching covenant).

Here, as in *Truax*, *Peterson* and *Barrows*, the State sought to require a private party to do something—to order Dr. Konzen and Mr. Boeschenstein to travel to Illinois and testify. The State was significantly involved in the attempt to coerce the individuals to appear as witnesses, and its conduct thus had to comply with the Fourteenth Amendment's requirements. It is therefore irrelevant whether, under other circumstances, OCF might have asked Dr. Konzen and Mr. Boeschenstein to travel to Illinois or to testify in court. The individuals had a "manifest interest in the freedom of [their] employer to exercise [its] judgment without illegal interference or compulsion." *Truax*, 239 U.S. at 38.

Because the State threatened OCF with sanctions for not producing the witnesses—and imposed those sanctions when the witnesses did not appear—any decision by OCF to compel the individuals' appearance would have been "not [OCF's] voluntary choice but the State's choice," *Barrows*, 346 U.S. at 254; *see also Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (private creditor's use of state-court garnishment process directed to debtor's private employer constituted state action); *Robinson v. Florida*, 378 U.S. 153, 156-57 (1964) (racial discrimi-

nation by private restaurant constituted state action when state law put financial burden on racially integrated restaurants). The state court's conduct therefore was subject to Fourteenth Amendment constraints.

CONCLUSION

For the reasons stated in the petition and in this reply brief, the petition should be granted.

Respectfully submitted,

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EXCERPTS FROM OCF'S BRIEF IN THE APPELLATE COURT OF ILLINOIS

. . . .

ARGUMENT

This appeal raises important issues concerning the validity and scope of Rule 237(b). First, contrary to fundamental principles of Illinois and federal due process, the trial court erroneously read the Rule to permit a party to compel the appearance at trial of an individual officer, director or employee or a party even when Illinois could not assert personal jurisdiction over that individual. Second, even were that reading correct, the trial court erred by imposing sanctions that went far beyond those authorized by Rule 219(c), which limits such sanctions to those necessary to address the prejudice suffered by the party seeking the non-appearing witness's testimony. This Court should reverse the trial court's rulings.

I. The Trial Court Lacked the Authority to Sanction OCF for the Failure of Its Employees and Director to Appear as Witnesses.

. . . .

B. An Illinois Court Does Not Have the Authority to Compel an Individual to Appear as a Witness Simply Because the Court Has Jurisdiction Over the Individual's Employer.

. . . .

As [*Salvator v. Admiral Merchant's Motor Freight*, 175 Ill. App. 3d 901, 530 N.E.2d 639 (1988)] and [*Lee v.*

Hyster Co., 156 Ill. App. 3d 214, 509 N.E.2d 586 (1987)] demonstrate, Rule 237(b) was not intended to supersede Illinois principles of due process by compelling the appearance at trial of individuals over whom the court lacks jurisdiction.[4] Nor can it supersede federal due process principles, which also prevent the trial court from compelling the appearance of these individuals at trial.[5] The trial court erred in reading Rule 237(b) to permit plaintiff to compel Dr. Konzen and Mr. Boeschenstein to appear as witnesses at trial simply because the court had

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[4] Nothing in either the text of Rule 237(b) or the accompanying Committee Comments suggests that the provision was intended to override Illinois principles of due process. To the contrary, Rule 237(b) was intended, in the interests of *convenience*, to obviate the need to serve a trial subpoena where the court already has jurisdiction. *See Hawkins v. Wiggins*, 92 Ill. App. 3d 278, 415 N.E.2d 1179, 1184 (1st Dist. 1980). It need hardly be said that one party's due process rights may not be overridden for the mere convenience of another party.

[5] A state, or a party using the state's process powers, cannot compel the presence at trial of an individual outside of the state's boundaries absent "minimum contacts" of a type sufficient to demonstrate that the individual has, by availing himself of the "benefits and protection of the laws of th[e] state," subjected himself to that state's process powers. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 319 (1945); *see Wiles v. Morita Iron Works Co.*, 125 Ill. 2d 144, 530 N.E.2d 1382 (1988). Moreover, even where otherwise sufficient minimum contacts have been established, the assertion of jurisdiction may violate due process constraints where other factors would make such an assertion "offen[sive to] 'traditional notions of fair play and substantial justice.' " *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (citing *Int'l Shoe*, 326 U.S. at 316) (citations omitted)); *see id.*, at 113-16; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985). Finally, an employer's contacts with the forum may not serve to establish an employee's amenability to suit in the forum state. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984).

jurisdiction over OCF, their employer. *See* T. (11/1/91) at 9, App. 12.

C. Where the Trial Court Lacks the Authority to Compel an Individual to Appear as a Witness, It May Not Sanction the Individual's Employer for the Individual's Failure to Appear.

If, as *Salvator* and *Lee* establish, an Illinois court may not rely on an individual's status as employee to compel that individual to appear as a witness in an Illinois court, it follows that the individual's employer may not be sanctioned for the individual's failure to appear. An Illinois court may not attempt to compel indirectly what due process principles prohibit it from compelling directly, and it may not punish one person for the acts of another in asserting his or her constitutional rights.

. . . .

The constitutionally objectionable effect of Rule 237(b) on OCF is well illustrated by *Truax v. Raich*, 239 U.S. 33 (1915). There, Arizona passed a statute that purported to require any employer of more than five persons to employ at least eighty percent "qualified electors or native-born citizens of the United States," and specified certain punishments for any employer that violated the statute. *Id.* at 35. The Supreme Court expressly rejected the argument that the suit must fail because the statute operated only on the employer, not the aliens who had a right not to be discriminatorily denied employment, and had no difficulty in holding that the statute violated the fourteenth amendment. *Id.* at 37-43. So too here, Rule 237(b) cannot be defended on the ground that it is OCF, not Mr. Boeschenstein or Dr. Konzen, that the statute singles out for sanctions.

The trial court's reading of Rule 237(b) is implicitly grounded upon the employer's assumed ability to coerce its employee to appear, ultimately upon threat of termi-

nation; similarly, the threat of harm to the corporation is intended to coerce the director's attendance at trial. But OCF cannot compel its employees to surrender a constitutional right, and it cannot simply "produce" Dr. Konzen and Mr. Boeschenstein as though they were *chattel* rather than *persons*. In fact, if OCF were to discharge them for exercising their right not to subject themselves to the jurisdiction of Illinois courts, or otherwise subject them to "coercion" (as suggested by the trial court, T. (11/1/91) at 8, 10), it would be exposed to potential liability for a wrongful discharge. *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St. 3d 228, 551 N.E.2d 981 (1990) (tort action available under Ohio law for wrongful discharge).

By conceding that the Illinois court could not assert jurisdiction over or sanction Dr. Konzen and Mr. Boeschenstein, the trial court conceded the fatal flaw of Rule 237(b). Simply put, it is fundamentally unfair, and hence a violation of due process, for the State to subject OCF to sanctions for an individual's exercise of his or her constitutional rights.

. . . .

EXCERPTS FROM OCF'S REPLY BRIEF IN THE APPELLATE COURT OF ILLINOIS

. . . .

. . . [T]his case concerns whether an Illinois court—in the face of unquestioned principles of Illinois and federal due process—may reach through an employer that is subject to personal jurisdiction in Illinois and, by threatening that employer with sanctions as severe as a default judgment, force one of its officers, directors, or employees who is not subject to process in Illinois nonetheless physically to appear here as a witness at trial. Put simply, this case presents the question whether an Illinois court can achieve indirectly what due process principles forbid it to attempt directly. The answer is plainly no, and nothing plaintiff has said in her brief in response counsels otherwise.

ARGUMENT

I. In Light of Illinois and Federal Due Process, Rule 237(b) Cannot Be Read to Permit a Trial Court To Sanction a Party for the Failure of Its Officer, Director, or Employee Physically to Appear at Trial.

In its opening brief, OCF demonstrated that in light of well-entrenched principles of Illinois and federal due process, Rule 237(b) cannot be read to authorize an Illinois trial court to sanction a party for the failure of its officer, director, or employee to appear as a witness at trial in response to a notice served upon the party pursuant to that Rule, and that if it were so read it would be constitutionally invalid. . . .

. . . [Where] there is no *constitutional* authority to compel the individuals to appear, Rule 237(b) cannot be

read to evade that restriction by authorizing the court to compel their appearance by means of an order directed at their employer. In *Truax*, the Court cursorily dismissed the suggestion that the discriminatory statute at issue was somehow saved because it operated directly on the employer and not the aliens who, upon being fired, would ultimately feel its effect. 239 U.S. at 38-39. So too here, Rule 237(b) cannot be justified on the ground that OCF, not the individuals whose appearance it is designed to compel, is the party subject to punishment.

Plaintiff also attempts to rely on *Oakview New Lenox Sch. Dist. No. 122 v. Ford Motor Co.*, 61 Ill. App. 3d 194, 378 N.E.2d 544 (3d Dist. 1978). There, before holding that the plaintiff had not shown the "good cause" required by Rule 237(b), the court suggested that jurisdiction over the corporate party "includes the power to order [that] corporate party to produce its officers and directors at trial." *Id.* at 547. However, not only did the *Oakview* court not have the benefit of the [Illinois] Supreme Court's decision in [*Rollins v. Ellwood*, 141 Ill. 2d 244, 565 N.E.2d 1302 (1990)], it was not asked to consider, and did not decide, the issue presented here—specifically, whether in light of Illinois and federal due process principles, Rule 237(b) may be read to compel the appearance at trial of a non-party witness who could not be independently reached with process.

. . . .

The decisions in *Aldrich* and *McGill* demonstrate that a court may not expand upon its authority to compel a witness's attendance even on the basis of the witness's status as a *party* to the litigation, let alone, as *Central Grain* and *Lee* confirm, his or her status as an officer, director, or employee of a party. While these cases involved statutory restrictions on judicial authority, their reasoning applies with equal force to constitutional restrictions: just as Illinois and federal courts cannot disregard limitations on their authority imposed by govern-

ing rules on the basis of the proposed witness's status as a party or employee of a party, Illinois courts applying Rule 237(b) cannot use that status as a reason to disregard limitations on their authority imposed by the Illinois and federal due process clauses. . . .

Finally, contrary to plaintiff's supposition, it is irrelevant to the question presented here whether OCF has attempted to compel Mr. Boeschenstein or Dr. Konzen to appear or could successfully do so. OCF objects to the construction given Rule 237(b) by the trial court precisely because it objects to serving as the tool by which that court has overreached its constitutional authority. The question here is not whether OCF can be compelled to perform some act, such as the production of documents, that is within the power of the corporation itself, by whatever agent it designates, to perform. The question is whether an Illinois court may constitutionally use the threat of sanctions against an employer to allow a litigant to, in effect, compel a designated employee who is not personally subject to Illinois process physically to appear here as a witness at trial. . . .

. . . .

EXCERPTS FROM OCF'S PETITION FOR LEAVE TO APPEAL TO THE SUPREME COURT OF ILLINOIS

. . . .

STATEMENT OF FACTS

. . . . OCF argued that plaintiff could not demonstrate good cause sufficient to compel the appearance of Dr. Konzen and Mr. Boeschenstein, and that using Rule 237(b) to compel OCF to force the individuals to surrender their right not to submit to jurisdiction in Illinois would violate Illinois and federal due process guarantees. . . .

ARGUMENT

Contrary to fundamental principles of Illinois and federal due process, the Appellate Court erroneously interpreted Rule 237(b) to permit plaintiff to compel the appearance at trial of individual directors, officers, and employees of OCF even though Illinois cannot constitutionally assert personal jurisdiction over those individuals. . . .

I. THIS COURT SHOULD GRANT LEAVE TO APPEAL IN ORDER TO CORRECT THE APPELLATE COURT'S ERRONEOUS INTERPRETATION OF RULE 237(b).

A. The Appellate Court Erred In Holding That A Trial Court May Constitutionally Coerce The Appearance Of Individual Witnesses Over Whom It Lacks Personal Jurisdiction By Imposing Sanctions On Their Employer.

It is undisputed that under the fiduciary-shield doctrine, as adopted by this Court in *Rollins v. Ellwood*, 141 Ill. 2d 244, 565 N.E.2d 1302 (1990), as well as the due process guarantee of the fourteenth amendment to the United States Constitution, the Illinois courts cannot constitutionally exercise personal jurisdiction over Mr. Boeschenstein and Dr. Konzen. It is likewise undisputed that, as a result, the Circuit Court could not constitutionally impose contempt sanctions directly on those individuals for refusing to appear at trial. The Appellate Court, however, has interpreted Rule 237(b) in a manner that permits an Illinois trial court to bypass the constitutional limitations on its powers by conscripting OCF, as the individuals' employer, to coerce the individuals' appearance. . . .

2. An Illinois Court Cannot Evade the Requirements of Due Process by Attempting to Coerce an Individual to Appear by Threatening Sanctions Against the Individual's Employer.

. . . .

. . . . As this Court noted in *Rollins v. Ellwood*, 141 Ill. 2d 244, 565 N.E.2d 1302 (1990), an employee "has little or no alternative besides unemployment when ordered to enter another State to carry out the wishes of

his employer." *Id.* at 280, 565 N.E.2d at 1318. Indeed, the Appellate Court's reasoning ignores the very purpose of Rule 237(b) as it was interpreted by the Circuit and Appellate Courts in this case—to allow the trial court to use an employer's leverage over its employees to compel the attendance of persons Illinois could not otherwise reach. As the Circuit Court observed, while it did "not have the authority to compel [the two men] to come to the State of Illinois to testify," OCF could achieve that result by "economic coercion." (R. VIII 8; *see also id.* at 8-11 (OCF must either coerce its employees' attendance by threat of dismissal or suffer default)). But if the Circuit Court could force OCF to order Dr. Konzen and Mr. Boeschenstein to appear under threat of discharge from employment, then the Circuit Court would have succeeded in coercing them to appear just as effectively as if it had threatened them with sanctions directly.[6]

Due process principles cannot be so easily evaded. . . . [I]t is well established that a state may not avoid constitutional limitations on its powers merely by having a private party act on its behalf: state action remains state action even when it is performed by a private party acting under the state's direction. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170-71 (1970); *Truax v. Raich*, 239 U.S. 33, 38-39 (1915); *see Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

In *Truax*, the United States Supreme Court unambiguously recognized that state coercion of an employer can operate as state action against its employees. There,

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[6] The question presented by the Appellate Court's construction of Rule 237(b) is *not* whether OCF can be compelled to perform some act, such as the production of documents, that is within the power of the corporation itself, by whatever agent it designates, to perform. The question is whether an Illinois court may constitutionally use the threat of sanctions against an employer to allow a litigant to, in effect, compel a designated employee who is not personally subject to Illinois process physically to appear here as a witness at trial.

the Court upheld an injunction against the criminal prosecution of an employer for exceeding a state-imposed quota limiting the number of his noncitizen employees. Although the employer had the absolute right to discharge the employees at will under state law,[7] the Court recognized that any such discharge would be a result of the requirement imposed by the state. 239 U.S. at 38-39. Therefore, the Court held that the statute directly violated the constitutional rights of the noncitizen employees who could potentially lose their employment as a result of the state's enforcement action against their employer. *Id.*; *see also Adickes*, 398 U.S. at 170-71 (employment discrimination under state compulsion is state action).

This rule is equally clear from *Sniadach*. There, the clerk of a Wisconsin state court had issued a prejudgment garnishment order directing the defendant's employer to hold a portion of the defendant's wages. The United States Supreme Court found that the garnishment procedures used in the state court violated the defendant's due process rights, even though a private party (the employer), and not an officer of the state, had seized the defendant's assets. Although the process of the court was directed to the employer, who alone would have been subject to sanctions for disobeying the court's order, it is clear that he was acting on behalf of the state

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[7] OCF does not have an absolute right to discharge its employees, but could potentially be subject to liability for wrongful discharge under Ohio law. *Greeley v. Miami Valley Maintenance Contractors*, 551 N.E.2d 981 (Ohio 1990) (tort action for wrongful discharge available under Ohio law). Moreover, if such a wrongful discharge were committed in concert with the State of Illinois and in violation of the requirements of federal or Illinois due process, OCF could also potentially be liable under 42 U.S.C. § 1983 or Illinois law. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (corporation acting in concert with state is liable under § 1983 for violation of due process clause).

in seizing the property of the employee, who was the ultimate target of the state's action. 395 U.S. at 338-39.[8]

Where, as here, a private party acts under compulsion from the state, the actions of that party are attributable to the state for due process and equal protection purposes. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937-39 (1982); *Adickes*, 398 U.S. at 170-71; *Truax*, 239 U.S. at 38-39. Thus, the Appellate Court in this case patently erred in suggesting that Rule 237(b) caused no due process problems because "[u]ltimately" it was the corporation, not Illinois, that "forces its employees to submit to the jurisdiction of Illinois." AppendixA at 14. Simply put, a state cannot do indirectly what due process prohibits it from doing directly.

3. Rule 237(b) May Easily Be Construed to Comport With the Due Process Requirements of the Illinois and United States Constitutions.

Whenever possible, a statute or rule should be interpreted to avoid constitutional defects. *People ex rel. Moss v. Pate*, 30 Ill. 2d 271, 274, 195 N.E.2d 641, 643 (1964); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Here, there is nothing in either the text of Rule 237(b) or the accompanying Committee Comments to suggest that in promulgating the Rule, this Court intended to ignore Illinois and federal due process principles by authorizing Illinois trial courts to compel attendance of persons beyond their personal jurisdiction. To the contrary, it

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[8] Similarly, in *North Georgia Finishing Co. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), a Georgia state court had issued a prejudgment writ of garnishment directing a bank to freeze the defendant corporation's funds in the bank's possession. Again, the United States Supreme Court struck down the state procedure on due process grounds, even though the funds were seized by a private party, the bank, acting under court order.

appears that Rule 237(b) was intended merely to allow a party, in the interests of convenience, to substitute a notice for the personal service of a trial subpoena in certain cases. *See Hawkins v. Wiggins*, 92 Ill. App. 3d 278, 285, 415 N.E.2d 1179, 1184 (1980). It need hardly be said that one party's due process rights may not be overridden for the mere convenience of another party. There is simply no reason to suppose that Rule 237(b), which provides for the service of notice on parties and their employees, officers and directors, allows the court to compel the attendance of witnesses who are outside its personal jurisdiction any more than does Rule 237(a), which provides for the service of trial subpoenas on nonparty witnesses. But so construed, as by the Appellate Court here, Rule 237(b) violates Illinois and federal due process guarantees.

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